Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	**CC Docket No. 04-313**
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	**CC Docket No. 01-338**
	)	

COMMENTS OF MCI, INC.

Pursuant to the Public Notice released by the Federal Communications Commission ("Commission") on October 20, 2004, MCI, Inc. ("MCI") respectfully submits these Comments in response to the Petition for Emergency Clarification and/or Errata ("Petition") filed by the Association for Local Telecommunications Services and eight competitive telecommunications companies (collectively "Petitioners") in the above-captioned matter.[1]

Petitioners seek clarification of the *Order and Notice of Proposed Rulemaking* ("*Order*")[2] in these dockets in two respects:

A. That the Commission clarify that changes to rates, terms, and conditions pursuant to change of law provisions shall not take effect until at least six months after publication of the *Order* in the Federal Register.[3]

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[1] Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Report No. 2678, *Public Notice* (rel. Oct. 20, 2004) ("Petition"). The *Public Notice* was published in the Federal Register on October 27, 2004. 69 Fed. Reg. 62693 (Oct. 27, 2004).

[2] Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 04-313, 01-338, *Order and Notice of Proposed Rulemaking First Report and Order*, 19 FCC Rcd. 16783 (2004) ("*Order*").

[3] Petition at 1-2.

B. That the Commission clarify that decreases as well as increases to UNE rates may take effect during the interim period set forth in the *Order*.[4]

Petitioners are correct to seek a clarification of what appears to be erroneous language regarding change of law provisions in the *Order*.[5] The Commission should issue the clarification sought by Petitioners, but in doing so should make clear that changes to rates, terms, and conditions pursuant to change of law provisions contained in interconnection agreements shall be allowed to take effect only in accordance with their terms as set forth in their individual agreements. Disputes as to when particular change of law provisions are triggered should be handled at the initial level in accordance with the dispute resolution provisions in the individual agreements or, by default, by state public utility commissions.

MCI also agrees with Petitioners' contention that the Commission should clarify that state commission decreases as well as increases to UNE rates may take effect during the interim period set forth in the *Order*.[6] There is simply no legitimate reason to allow only the effectuation of rate changes that either preserve the status quo or benefit one particular class, *i.e.*, incumbent local exchange carriers ("ILECs").

I. CHANGES TO RATES, TERMS, AND CONDITIONS PURSUANT TO CHANGE OF LAW PROVISIONS SHOULD NOT TAKE EFFECT UNTIL SIX MONTHS AFTER PUBLICATION OF THE *ORDER* AND SHOULD TAKE EFFECT ONLY IN ACCORDANCE WITH THEIR SPECIFIC TERMS

In the *Order*, the Commission provides that although it is generally freezing interconnection rates, terms, and conditions for six months following publication of the *Order* in the Federal Register, it is "expressly preserv[ing] incumbent LECs' contractual prerogatives to

[4] Petition at 3-4.

[5] *See* Petition at 1-2.

[6] *See* Petition at 3-4.

initiate change of law proceedings to the extent consistent with their governing interconnection agreements."[7] The Commission goes on to state that no changes in rates, terms, or conditions resulting from change of law provisions shall take effect "before the earlier of (1) Federal Register publication of this Order or (2) the effective date of our forthcoming final unbundling rules."[8] Thus, a strict reading of the *Order* would permit ILECs to implement changes pursuant to change law provisions as of the date of the *Order's* publication, September 13, 2004.[9]

Petitioners correctly contend that the Commission's statement that rates, terms, or conditions resulting from change of law provisions may be implemented beginning on the date of publication is "an obvious oversight and error" because such implementation would not be consistent with the six-month interim period adopted by the Commission.[10] Petitioners therefore assert that the Commission should clarify that it meant to provide that changes cannot be implemented "before the earlier of (1) six months after Federal Register publication of this Order, or (2) the effective date of our forthcoming final unbundling rules."[11]

Petitioners are right to draw attention to the Commission's change of law statement because the statement makes little sense. It is written as if the Commission were unsure which would happen first: the *Order* being published in the Federal Register or the final unbundling rules becoming effective. However, because the *Order* started the rulemaking proceeding for the final unbundling rules, it had to be published before those rules could become effective. As it

[7] *Order* at ¶ 22.

[8] *Order* at ¶ 22.

[9] *See* 69 Fed. Reg. 55111 (Sept. 13, 2004).

[10] Petition at 2.

[11] Petition at 2 (emphasis in original).

happened, it was published on September 13, 2004, and the Commission is, of course, currently considering the unbundling rules.[12]

Petitioners are therefore correct that the Commission's statement regarding the earliest permissible implementation date for changes to rates, terms, or conditions effected pursuant to change of law provisions was the product of "an obvious oversight and error." Thus, the Commission should clarify that changes to rates, terms, and conditions pursuant to change of law provisions shall not take effect until at least six months after publication of the *Order* in the Federal Register.

Additionally, in clarifying this matter, the Commission should heed its language in the *Order* in which it recognized the importance of "preserv[ing] incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements."[13] Specifically, the Commission should clarify the language such that changes pursuant to change of law provisions contained in interconnection agreements shall be allowed to take effect only in accordance with their terms as set forth in their individual agreements. Petitioners' request specifically should not be granted in a manner that automatically permits any changes made pursuant to change of law provisions to take effect on a date certain, such as six months after Federal Register publication, thereby unlawfully abrogating parties' contracts.

Allowing existing change of law provisions to operate as they were intended would respect the fact that such provisions were individually negotiated or arbitrated in the context of often unique interconnection scenarios. When the parties reached their agreements and

[12] 69 Fed. Reg. 55111 (Sept. 13, 2004).

[13] *See Order* at ¶ 22.

corresponding change of law provisions, they contemplated that the law could change and, with it, the terms of their agreements. The Commission cannot override parties' agreements; it should allow parties to have the benefit of their bargains.

To the extent that disputes arise as to when particular change of law provisions are triggered, the first level of review should be governed by dispute resolution provisions in those contracts or, by default, by state commissions. State commissions are closest to the parties, their customers, and the competitive landscape of their particular jurisdictions, and they approved the agreements in the first instance. As such, they are in the best position to make initial rulings on change of law provisions.

II. STATE COMMISSION DECISIONS DECREASING UNE RATES SHOULD BE PERMITTED TO GO INTO EFFECT DURING THE INTERIM PERIOD

In the *Order*, the Commission provides that state commission decisions increasing UNE rates may take effect during the interim period.[14] However, it does not expressly provide for the corollary: that state commission decisions decreasing UNE rates may also take effect during the interim period. As such, a strict reading of the *Order* would indicate that only the effectuation of rulings that preserve the status quo or are favorable to one class of carrier – ILECs – are permissible. Despite the highly significant impact that this particular aspect of the *Order* may have on competitive carriers, the Commission made no attempt to explain why it issued such one-sided language. MCI agrees with Petitioners that the Commission should remedy this matter by clarifying that decisions that decrease as well as increase UNE rates may take effect during the interim period.[15]

[14] *Order* at ¶¶ 1, 21 and 29.

[15] *See* Petition at 3-4.

Providing that rate increases but not decreases may go into effect during the interim period has a high potential to lead to unequal treatment and unlawful discrimination against competitive carriers. Petitioners note that several state commissions have pending ratemaking proceedings which may be concluded by the end of this year or early next year.[16] Those commissions cannot receive pleadings, conduct hearings, and take other steps commensurate with ratemaking proceedings under the cloud of a preordained plan that even if they find that rate decreases are warranted and hence order them, such decreases cannot go into effect. The ability to actually achieve warranted reductions in rates – *i.e.*, to have them go into effect – must continue to exist if state commission ratemaking proceedings are to retain credibility and meaning during the interim period.

Additionally, allowing rate reductions as well as increases to take effect would not detract from the Commission's goal of generally preserving the status quo during the interim period. By expressly permitting rate increases to take effect, the Commission has demonstrated its belief that no legal, policy, or economic reasons require that such rates be held absolutely unchanged. In that regard, the Commission enunciated no reason that rate increases should be the only permissible form of change. Accordingly, the type of change should make no difference to the Commission's goals. Thus, the Commission should allow both increases and decreases to take effect during the interim period.

[16] Petition at 3.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, MCI respectfully asks the Commission to act in the public interest in accordance with the proposals set forth herein.

Respectfully submitted,

/s/ John R. Delmore

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CERTIFICATE OF SERVICE

I, John R. Delmore, hereby certify that on this 11th day of November, 2004, copies of the foregoing were served by regular mail, unless otherwise noted, on the following:

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